

Town of
Seabrook, New Hampshire

Department of Public Works

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March 14, 2013

Page 1 of 8

Mr. Newton Tedder, US EPA – Region
Five Post Office Square, Suite 100
Mail Code Po6-4, R
Boston, MA 02109-3912

Re: Comments/Protests to the 2013 Draft Small MS4 General Permit

Dear Mr. Tedder:

The Town of Seabrook is a small, predominately blue collar community (Pop. 8,693) along the Atlantic coast in southeastern New Hampshire. For the past nine years we have spent \$543,849 of taxpayer's dollars to meet your requirements in managing our stormwater. Now you come before us with even more stormwater requirements that have significantly more costs associated with them over the next five years. This while Concord, N.H. (Pop. 42,695), Keene, NH (Pop. 22,420), and Laconia, NH (Pop. 15,951) have been given waivers/exemptions from participating during the last nine years and also again during these Phase 2 new rules which encompasses the next 5 years. We conclude that no costs to these communities while little Seabrook has spent over half a million dollars is grossly unfair!

The following are Seabrook's protests, comments, and questions that we ask that you will address in the coming months:

1. Regulatory Flexibility Act (RFA), EPA Fact Sheet, Page 64 of 167, Paragraph E

Seabrook Comment: The Regulatory Flexibility Act deals with Congress' 1980 finding that Regulations cannot impose unnecessary and burdensome demands on small towns disproportionately. It requires the EPA to carefully consider the economic impacts their rules have on small towns defined as population less than 50,000. We believe that EPA has not met their responsibility to conform with the RFA.

- EPA has written their own "Guidance for EPA Rule Writers" concerning the RFA. They boldly state that this guidance document is not binding and can be changed at any time without public notice. EPA actions with regards to this issuance of these new regulations, gives the appearance to this small town that they believe they have the authority to interpret Congress' requirements, change Congress' interpretation at will, and neglect any complaint from the regulated communities.

- EPA has unilaterally determined “that since this general permit affects less than 100 small entities, it does not have a significant impact on a substantial number of small entities.” There is no mention of a minimum number of small entities in 1980 U.S. Congress Regulatory Flexibility Act (RFA).

Seabrook contends that the EPA regulations create unnecessary and burdensome demands. We must make the following argument that the RFA must be applied:

- a) We believe there is no legal basis for EPA’s minimum criteria of 100 small entities and contend that Congress’ intent was to protect even one small entity from disproportionate Federal demands.
- b) Small entities are defined “as the governments of a city, county, town, township, village, school district or special district” and also include small businesses. There are hundreds if not thousands of these small entities affected.
- c) Since this is a Federal Regulations, the small entity calculation should include towns and cities in other States where the NPDES Regulations also apply.

2. **Unfunded Mandate Report Act (UMRA)**, EPA Fact Sheet, Page 64 of 167, Paragraph F

Seabrook Comment: We are having difficulties comprehending the EPA’s interpretation of the Unfunded Mandate Report Act. This act requires Federal Government entities to provide funding for federal mandates or otherwise show that the funds that the entity needs to abide by the mandate are not excessive and will not be siphoned from other important municipal functions, thereby weakening those functions. Somehow the EPA finds that these stormwater regulations do not meet the definition of “regulatory actions” and are therefore not subject to the requirements of the UMRA. It is Seabrook’s position that the general permit requirements are unfunded mandates that are subject to the Act. Implementing these requirements has and will adversely impact other Town functions.

The Town of Seabrook disagrees with the EPA’s claim that the general NPDES permit is not subject to the requirements of both the U.S. Congress RFA and the UMRA. We demand that EPA perform the required flexibility analysis and provide funding for this unfunded mandate, or, delay the issuance of these rules so that EPA can work with Congress to change the Clean Water Act criterion that includes communities on the basis of whether they are located in an urbanized area or not, to one that is based primarily on the size of the community and affordability.

3. **Executive Order 12866**, EPA Fact Sheet, Page 64 of 167, Paragraph C

Seabrook Comment: Executive Order 12866 (President Clinton ’93) is an effort to create a regulatory system that is effective, consistent, and sensible without unreasonable cost on society. It applies to “significant regulatory action” that will adversely affect State and local communities in a material way. EPA has determined that this new storm water draft general permit is not a “significant regulatory action” and is therefore not subject to review under this Executive Order. There’s a pattern here. It seems that no matter what type of regulatory controls the Federal Government institutes to protect local communities, the EPA considers itself immune, and overturns the U.S. Congress Acts.

4. Federal MS4's Exemptions- General

Seabrook Comment: EPA has exempted Federal agencies from certain stormwater requirements. We assume that the EPA has, in good faith, determined that this is a beneficial policy for both the public and governmental entities. We agree. Please expand the exemptions to include State and local government entities.

5. Duty to Comply, Standard General Requirements, Appendix B, Pages 1-3 of 10

Seabrook Comment: The EPA has created a two and a half page list of punishments that we assume can be inflicted on us for any permit violation. The fines and incarceration penalties are **chilling** (see below).

Criminal Penalties

Negligent Violations – \$2,500 minimum to \$25,000 maximum **per day** of violation, or one year imprisonment (maximum), or both. Double the penalties for second offense.

Knowing Violations – \$5,000 minimum to \$50,000 maximum, or three years imprisonment (maximum), or both. Double the penalties for second offense.

Knowing Endangerment – \$250,000 maximum, or fifteen years imprisonment (maximum), or both.

False Statement -- \$10,000 maximum, or two years imprisonment (maximum), or both.

Civil Penalties – \$32,500 per day per each violation.

Administrative Penalties

Class I – \$11,000 per violation not to exceed \$32,500.

Class II – \$11,000 per violation not to exceed \$157,000.

The Town cannot imagine EPA would impose jail time or exorbitant fines on the townspeople and town workers in Seabrook. A stiff penalty by New Hampshire standards is \$500 a day. We have heard that the EPA believes that the stiff penalties will help ensure compliance. While that may be the case, we perceive that your penalties are an indication of a government bureaucracy run amok. We ask that you abolish the criminal penalties completely and reduce the Civil and Administrative penalties by a factor of ten.

6. Need to Halt or Reduce Activity Not a Defense, Standard General Requirements, Section B.3, Page 3 of 10

Seabrook Comment: In this section, EPA seems to be predetermining what will or will not be a legal defense of a violation. Doesn't the Judicial Branch of Government determine whether a legal defense is acceptable? If so, please delete this paragraph.

7. Duty to Mitigate, Standard General Requirements, Section B.4, Page 3 of 10

EPA: "You must take all reasonable steps to minimize or prevent any discharge...in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment."

Seabrook Comment: This one sentence gives us some insight into the thinking among the EPA rule writers. The regulation implies that our drainage system (catch basins, roadside swales, culverts, etc.) may be a threat to the health of our citizens. There is no evidence of that. None of our untreated sewage is polluting the drainageways. No one is drinking stormwater runoff. There are no outbreaks of waterborne illnesses. Most importantly, there is no reasonable likelihood of our stormwater adversely affecting the health of Seabrook citizens. If there was likelihood, Seabrook would have addressed it long before the EPA was created.

But health is not the only EPA criteria for this rule-making. The catch-all phrase “or the environment” has been inserted here. There is no winning this debate. In EPA’s mind, almost all human activity has a reasonable likelihood of adversely affecting the environment. Environmentalists scold us for driving cars and turning on the light. Carbon dioxide is created from our breath. Now, with this regulation, the environmentalists’ questionable beliefs are the Seabrook taxpayers problem—another non-debatable, unfunded mandate. Seabrook emphatically objects.

8. Proper Operation and Maintenance, Standard General Requirements, Section B.5, Page 3 of 10

EPA: “You must at all times properly operate and maintain all facilities...to achieve compliance with the conditions of this permit”.

Seabrook Comment: We resent EPA’s attitude towards our Town with the forceful “You must at all times...” along with the threat of imprisonment. Proper operation and maintenance of Town facilities is a high priority and constant goal. We cannot imagine improving our O & M by issuing edicts to our fellow Town employees. To err is human.

9. Reporting Requirements – 24 Hour Reporting, Appendix B, Section B.12.F.1, Page 7 of 10

EPA: “You must report any non-compliance which may endanger health or the environment. Any information must be provided orally within 24 hours from the time you become aware of the circumstances.”

Question: Is it really the EPA’s intent to be notified of all stormwater non-compliances within 24 hours? Please provide the EPA contact names and telephone numbers. Also, will someone be available to take calls from Friday afternoon to Monday morning?

10. Allowable Non-Storm water Discharges, General Permit, Section 1.4, Page 5&6 of 60

Seabrook Comment: Section 1.4 identifies 18 specific non-stormwater discharges that EPA will allow under this permit such as watering the lawn and washing the street. Our questions concern discharges that are not listed and thereby not allowed.

Question 1: The permit seems to allow homeowners to wash down their exterior siding on their home “without detergent” but allow the washing of their car with detergent. Are we correct in assuming that, other than car washing, one is not allowed to use soap or bleach or anything where the rinse water will come into contact with the ground?

Question 2: “De-chlorinated swimming pool discharges” are allowed. What are EPA’s recommended procedures for determining whether this water is sufficiently de-chlorinated? Is it anticipated that a Town employee or agent will need to verify the absence of chlorine before emptying the pool?

Question 3: “Water from crawl space pumps” is allowed. Crawl spaces in New Hampshire are rare. Cellars and basements are the norm. Is there a reason that basement sump pump discharges are not listed and possibly not allowed?

Question 4: “Individual resident car washing” is very specific in identifying the party allowed to wash a car. If a local school group wanted to have a car wash fund raiser, would they be required to obtain a Federal NPDES Permit?

Question 5: Is the spraying of pesticides or herbicides an allowable discharge? If not, what are the EPA’s requirements for the use of these products?

Question 6: Is the spreading of fertilizer, lime, or manure an EPA authorized activity? If not, what are the requirements?

Question 7: Are active farms exempt in any way from these stormwater regulations?

Question 8: Enforcement – How does the EPA expect communities to police non-allowable discharges? Should towns encourage neighbors to spy on neighbors? Will the EPA’s enforcement division be available to take calls from complainants?

11. Discharge to Chloride Impaired Water, General Permit, Section 2.2.4, Page 23 of 60, and Appendix H

The MS4 Draft General Permit includes requirements for communities that discharge to chloride impaired waters. It has come to the Town of Seabrook’s attention that Cains Brook-Noyes Pond is on the impairment list, which, according to the draft permit, requires the preparation of a Salt Reduction Plan (Appendix H, page 3), and possibly a Water Quality Response Plan (Page 19 of 60). The Town of Seabrook objects to these and all permit requirements pertaining to chloride impairment on the following grounds:

- The Cains Brook watershed encompasses land area that is located in both New Hampshire and Massachusetts, and therefore includes many more sources than just Seabrook, such as but not limited to: other municipalities, private entities, MassDOT and NHDOT. The waterway is the recipient of runoff that Seabrook cannot control; we are a very small percentage of the overall issue. It is unfair to saddle the downstream-most community with any chloride-control requirements. We object to risking the safety of our residents due to problems caused by others;
- The following NHDOT roadways and facilities are located in Seabrook: Route 95, rest area off Route 95, Route 1, Route 107, Route 286 and Route 1A. It is our position that these are the primary sources of the problem, not the few municipal roads located in the watershed. NHDOT must be made the sole entity responsible for addressing chloride impairment of Cains Brook-Noyes Pond.

12. Catchment Investigation, General Permit, Sections 2.3.4.8.c and 2.3.4.8.e., Pages 31 and 35 of 60, and Page 38 of 60, 2.3.4.9.c

EPA requires that catchments be ranked and prioritized and that a full investigation of every catchment be performed regardless of screening results. Catchments can be excluded only under provisions that are extremely restrictive, which in practice, would result in exempting very few areas. If prior screening results completed under the first permit term show that an outfall has no dry weather flow and no evidence of illicit activity, why perform needless upstream investigation? The Town of Seabrook objects to the provisions contained in the aforementioned sections. These might apply to highly urbanized areas with ancient sewer, storm drain or combined sewer systems, but not communities with new infrastructure. All of Seabrook's piping is modern (less than 20 to 25 years old) and completely separated. In our case, such catchment investigations would only be necessary in situations where outfall screening indicates the presence of contamination.

13. Wet Weather Investigation, General Permit, Section 2.3.4.8.e.ii.b, Page 36 of 60

EPA requires wet weather screening under certain conditions, including if one or more System Vulnerability Factors are present. The factors, as listed on Page 35 of 60, are written in such a way that makes it impossible for nearly any regulated entity to be exempt from wet weather sampling. For example, 'crossings of storm and sanitary sewer alignments'. How many communities with both types of systems do not have crossings of some sort? Why is this concern in a community that has new piping? Seabrook objects to wet weather screening on the grounds that the Town's systems are less than 20 to 25 years old and are constructed of modern materials such as polyvinyl chloride (with gaskets), reinforced concrete and precast concrete.

14. Construction Site Stormwater Runoff Control, General Permit, Section 2.3.5, Page 39 of 60

EPA will require municipalities to administer such controls at sites exceeding 1 acre. In spite of the claim made on Page 39 of 60 that EPA's program is separate and distinct, the requirements remain similar, if not duplicated. The Town of Seabrook objects to Section 2.3.5 on the basis that EPA already has a Construction General Permit (CGP) program that is substantially similar and the requirements contained in the MS4 NPDES General Permit appear to unfairly burden the Town with enforcement responsibilities.

15. Transfer Stations, Stormwater Pollution Prevention Plan, General Permit, Section 2.3.7.2, Page 46 of 60

EPA requires that a stormwater pollution prevention plan (SWPPP) be developed for the Town's Transfer Station. The Town of Seabrook's Transfer Station is already permitted under Sector N of the Multi-Sector General Permit (MSGP) program. Under this program, a SWPPP was prepared. It is inefficient and unnecessary for the Town to be regulated under two different programs for the same issues at one facility. The Town of Seabrook objects to the MS4 NPDES General Permit requirement on the basis that the Transfer Station is currently covered under the MSGP.

16. Wastewater Treatment Facilities, Stormwater Pollution Prevention Plan, General Permit, Section 2.3.7.2, Page 47 of 60

EPA also includes 'other waste handling facilities' in the SWPPP requirement. Please clarify whether this includes wastewater treatment plants. If so, similar to the Transfer Station issues described above, the Town's wastewater treatment facility is already permitted under the MSGP. The Town of Seabrook objects to unnecessary and redundant permitting under the MS4 NPDES program.

17. Fiscal Time Constraints in Issuance of Final MS4 General Permit

The EPA may be unaware of the process that Towns in New Hampshire follow in order to provide funding to comply with this EPA mandate. Here in Seabrook, the DPW will start to prepare their portion of the Town budget in mid July 2013. It will be submitted for review and adjustment to Town Hall in late summer and finalized in November. It will be published in the Town Report and sent before the voters in March 2014. Seabrook DPW has provided a partial list of activities that will need to be completed within the first year of 2013 MS4 General Permit:

- Update stormwater management plan
- Prepare NOI
- Determine impacts of water quality standards, outstanding resources and high quality water criteria
- Prepare water quality response plan
- Public education and outreach
- Develop outfall inventory
- Prepare written illicit discharge detection and elimination (IDDE) program
- Develop a written procedure for screening and sampling outfalls
- Initiate wet and dry weather sampling of outfalls
- Delineate outfall catchment areas and prioritize catchments for investigation
- Develop written procedures for site plan reviews
- Prepare written operations and maintenance manual for Good Housekeeping and Pollution Prevention measures
- Prepare inventory of facilities: parks and open space, building and facilities (i.e. schools, town offices, police and fire buildings, pools, garages, etc.), vehicles and equipment

Rough estimate: \$100,000 worth of work.

The costs for the first year of the program are substantial. Seabrook will not be able to shift monies around outside of budget cycles to fit this in. For the past several years, EPA has been unable to forecast a date for finalizing the MS4 regulations. Please be aware that the Final Permit must be in place by mid July 2013 in order to be funded at the March 2014 Town Meeting—any later will push the funding back to March 2015, making us unable to meet the first year requirements.

Conclusion

Based on the EPA's response to the 2008 Public Comments, Seabrook is not confident that our 2013 comments, protests, and questions will be sufficiently reviewed by EPA. Please prove us wrong by responding to each item in writing. You can trust that Seabrook personnel will be available to respond to your comments or questions. Please do not hesitate to contact me.

Respectfully submitted,



Joseph Titone
Interim Town Manager
Town of Seabrook, N.H.

cc: Board of Selectmen
Kelly O'Connor, Executive Secretary
Mr. Curtis Spalding, Regional Administrator, EPA Region 1
Stephen S. Perkins, US EPA
Kelly Ayotte, U.S. Senator
John M. Starkey, DPW Manager
Oliver Carter, Town Treasurer
Lilli Gilligan, Finance Manager
Sue Foote, Conservation Commission Chairwoman
Don Hawkins, Planning Board Chairman
Phil Maltais, Interim Superintendent, Wastewater Treatment Facility
Tom Campbell, Industrial Pre-treatment Manager, WWTF
Aboul Khan, NH House of Representatives
Amy Perkins, NH House of Representatives
Lawrence Perkins, NH House of Representatives
Jeff Andrews, NHDES
Lynn Willwerth, DPW Secretary
Judie Walker, DPW Secretary
Bruce Felch, DPW Foreman